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MICHAEL RUDAK, JR., CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

No. 77-1378

JAPAN LINE, LTD., *et al.*, Appellants

v.

COUNTY OF LOS ANGELES, *et al.*, Appellees

On Appeal from the Supreme Court of California

**BRIEF AMICUS CURIAE OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA
ON BEHALF OF:**

AIR NEW ENGLAND, INC., ALLEGHENY AIRLINES, INC., AMERICAN AIRLINES, INC., BRANIFF AIRWAYS, INC., CONTINENTAL AIR LINES, INC., EASTERN AIR LINES, INC., THE FLYING TIGER LINE, INC., FRONTIER AIRLINES, INC., HUGHES AIRWEST, NATIONAL AIRLINES, INC., OZARK AIR LINES, INC., PAN AMERICAN WORLD AIRWAYS, INC., PIEDMONT AIRLINES, TRANS WORLD AIRLINES, INC., WESTERN AIRLINES, INC.

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August 28, 1978

COMES NOW, the

Air Transport Association of America on behalf of Air New England, Inc., Allegheny Airlines, Inc., American Airlines, Inc., Braniff Airways, Inc., Continental Air Lines, Inc., Eastern Air Lines, Inc., The Flying Tiger Line, Inc., Frontier Airlines, Inc., Hughes Airwest, National Airlines, Inc., Ozark Air Lines, Inc., Pan American World Airways, Inc., Piedmont Aviation, Trans World Airlines, Inc., and Western Air Lines, Inc., pursuant to Rule 42 of this Court, and hereby respectfully files the attached brief amicus curiae on behalf of Appellants, Japan Lines, Ltd., et al.

Written consent to the filing of such brief has been received from both parties. Copies of their consents have been filed with the Court.

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BRIEF AMICUS CURIAE OF THE
AIR TRANSPORT ASSOCIATION OF AMERICA_____
INTEREST OF AMICUS CURIAE

The air carriers filing this brief, amicus curiae, are all U.S. airlines who provide regularly-scheduled air transportation services to members of the traveling and shipping public. Each is vitally concerned that the California ad valorem property tax on foreign-owned instrumentalities of foreign commerce, specifically,

cargo containers, be recognized as an unconstitutional exercise of the state's taxing authority. Endorsement by the Supreme Court of such a tax is viewed as guaranteeing attempts at expanding state taxation to foreign-owned aircraft operating solely in foreign commerce.

Taxation of this nature runs afoul of the U.S. Constitution. Yet, citing the California Supreme Court's decision in the instant case as establishment of authority, the California State Board of Equalization has proposed to amend its property tax regulations so as to impose ad valorem taxes on foreign aircraft which land in the state during the course of their journeys in foreign commerce. While the Board has postponed its consideration of the proposed tax, pending review of this case by the Court, it is anticipated that Court approval of the tax on cargo containers

will trigger imposition of the state tax on foreign aircraft. And other states are likely to follow California's lead.

Since U.S. air carriers operating in California are already taxed on those aircraft having an intermittent situs within the state, and use U.S.-owned cargo containers in their freight operations, the proposed action by the State Board of Equalization will have no direct impact on them. Thus, their interest in this proceeding may appear tangential. This is not the case. The carriers believe the imposition of a tax on foreign-owned instrumentalities of foreign commerce is impermissible under the Constitution. They also believe that such taxation here will prompt foreign governments to impose similar charges on U.S.-owned instrumentalities which cross their borders in the course of foreign commerce. This very

real possibility will have a direct financial effect on the current and future operations of the U.S. air carriers, filing as amicus curiae, who serve foreign points, including transborder points in Canada and Mexico. It can be anticipated that every foreign government, whose businesses have been taxed in any one of the fifty U.S. states, will seek to offset the competitive costs to their nationals by imposing similar charges on U.S. instrumentalities of commerce. This will have a pronounced and spiralling impact on the U.S. air carriers.

Due to the reasonable expectation of such reciprocal charges by foreign governments and the belief that state attempts to tax instrumentalities of foreign commerce is impermissible under the Constitution, the carriers, filing as amici curiae, have a substantial interest in this proceeding. Their participation, it is asserted, will

also assist the Court by emphasizing the ramifications of this decision on other U.S. instrumentalities of foreign commerce.

ARGUMENT

I. A STATE MAY NOT IMPOSE AN AD VALOREM PROPERTY TAX ON INSTRUMENTALITIES ENGAGED IN FOREIGN COMMERCE WITHOUT VIOLATING THE COMMERCE CLAUSE OF THE CONSTITUTION

Article I, section 8, clause 3 of the United States Constitution grants to the government of the United States "the power to regulate commerce with foreign Nations, and among the several states..." By ratification of this clause, the states surrendered their power over foreign, as well as interstate commerce.

The drafters of the Constitution, being responsive to the peoples' desires for independence, fashioned a federalism which retained with the states and/or the people vast amounts of power. In certain areas,

however, the drafters recognized the need for central control. One such area was the regulation of commerce. The ratification of the Constitution by the states endorsed this principle and, thereby, the powers of the respective states in this area were surrendered. A presumed explanation of this surrender is its logic when viewed against the backdrop of the Constitution, and its recognition of the realities of governing. It would have been repugnant to the principles of the Constitution for one state to interfere with the commercial freedom of any other, and removal of obstacles to commercial relations imposed by any state was in the best interests of all states. Moreover, representation as a unified, strong nation in dealings with foreign countries served the people well.

The rationale leading to adoption of the principle of federal control over

foreign commerce being so simple, and yet, compelling, it has been continually endorsed in controversies argued before this Court. In the facts presented by the instant case, the Court is once again being called upon to review the Constitutional principle of federal control over foreign commerce.

In Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851), the Court recognized that the commerce clause specifically granted power over foreign commerce to the federal government; it did not specifically exclude the states from the exercise of any authority over the subject matter. Still, the surrendering of this power to the federal government was pivotal in determining whether the actions of the state, in this case the collection of a fee on vessels leaving Philadelphia, were in conformity with the commerce clause. The Court found

that "[i]f they [the states] are excluded [from the commercial power] it must be because the nature of the power, thus granted to commerce, requires that a similar authority should not exist in the states." Id. at 318. Where the federal government has acted, and in those areas inherently national, it was determined that the exercise of similar authority by the states would infringe on the commerce clause. Thus, despite the absence of federal action, state efforts at regulating commerce would be found to be in conflict with the commerce clause if the area was one from which national regulation naturally flowed. In these areas, federal regulation was exclusive. As the Court stated: "Whatever subjects of this power [to regulate commerce] are in their nature national, or admit only of one uniform system, or plan of regulation, may justly be said to be of such a nature as

to require exclusive legislation by Congress." Id. at 319

This decision of the Supreme Court, made well over one hundred years ago, is still a sound pronouncement of our federalism as it pertains to foreign commerce. 1/

1/ The following cases, inter alia, have cited Cooley as enunciating the rule on federal exclusivity under the commerce clause: Gilman v. Pennsylvania, 70 U.S. (3 Wall.) 713, 727 (1866) (authority of the state to build bridges over navigable waterways); Hinson v. Lott, 75 U.S. (8 Wall.) 148, 152 (1864) (authority of the state to tax liquors brought into the state); Philadelphia and Reading R. R. Co. v. Pennsylvania, 82 U.S. (15 Wall.) 232, 280 (1873) (authority of the state to tax freight moving from state to state); Wilson v. McNamee, 102 U.S. (12 Otto.) 572, 575 (1881) (validity of state pilotage laws); Cincinnati, etc. Packet Co. v. Trustees of Cattlesburg, 105 U.S. (15 Otto.) 559, 563 (1882) (compensation for use of an improved landing); Kelly v. Washington, 302 U.S. 1, 14 (1937) (state

Its statement of federal exclusivity over foreign commerce supports the position of the carriers, filing as amici curiae, that only the federal government has the authority to tax foreign-owned instrumentalities of foreign commerce. The states' exercise of similar authority affronts the commerce clause of the Constitution because this form of taxation "admit[s] only of one uniform system." Id.

Given this controlling interpretation of the commerce clause, it must be concluded that, when considering the appropriateness of state taxation of vessels, the Supreme

inspection and regulation of vessels); Burbank v. Lockheed Air Terminal, 411 U.S. 624, 625 (1973) (validity of city ordinance forbidding jet aircraft from taking off from 11 p.m. of one day to 7 a.m. of the next); and, Goldstein v. California, 412 U.S. 546, 553 (1973) (validity of state statute prohibiting the pirating of recordings).

Court has struck down 2/ these taxes, at least in part, on the basis that such taxation was exclusively federal in nature. Thus, when California attempted to impose property taxes on vessels temporarily harbored within the state, which were engaged in trade and commerce and whose "home ports" were in states other than California, the Supreme Court rejected the taxes and held that these ships entered the ports of California "independently of any control over them, except as it respects such municipal and sanitary regulations of the local authorities as are not inconsistent with the constitution and laws of the General Government,

2/ The basis of the Court's espousal of the "home port" doctrine, to be discussed infra, apparently draws support from both the due process clause and the commerce clause of the Constitution. This point was noted in Scandinavian Airlines System v. County of Los Angeles, 56 Cal. 2d 11, 363 P. 2d 25, 14 Cal. Rptr. 25, cert. denied, 368 U.S. 899 (1961).

to which belongs the regulation of commerce with foreign nations and between the states."

Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596, 598 (1855). This initial pronouncement that a vessel could be taxed only by the domiciliary state of its "home port," which cited no controlling provision of the Constitution, appears, by reference to admiralty law and its repeated discussion of ships sailing on the high seas, to have been predicated on the premise that ships which sail the international seas are subject to special rules in their enjoyment of free passage and cannot be controlled or taxed by the states.

This federal exclusivity argument, however, became more firmly grounded in the commerce clause when, in Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1873), the Court upheld the validity of the "home port" doctrine even when the home port

state chose not to impose a tax on its vessels. With the elimination, therefore, of the multiple taxation issue, due process clause support for the doctrine gave way to the commerce clause. Basing the "home port" doctrine on the commerce clause, moreover, explains not only the modifications made to it throughout the years but also its current validity with respect to instrumentalities of foreign commerce. And, foundation in the commerce clause requires that the "home port" doctrine be found controlling in the present case, with the result that California's attempts to tax foreign-owned cargo containers moving in foreign commerce, or any other similarly situated instrumentalities of commerce, be rejected.

Modifications to the doctrine originating in the Hays decision appeared in due course, although none of these decisions

went as far as the California Supreme Court in the instant proceeding when it attempted to knell the death toll of the "home port" doctrine. Thus, for example, in Pullman's Palace Car Co. v. Pennsylvania, 141 U.S. 18 (1891), the Court determined not to expand the "home port" doctrine to the rolling stock of rail companies. Yet, at the same time, the Court strongly affirmed the applicability of the doctrine to commerce by water, by stating that "... the vehicles of commerce of water being instrumentalities of intercommunication with other nations, the regulation of them is assumed by the National Legislature. So that state interference with transportation by water, and especially by sea, is at once clearly marked and distinctly discernible." Id. at 23-24.

As a result of this distinction, taxation by the states of vehicles of interstate commerce which entered the state was

was upheld, American Refrigerator Transit Co. v. Hall, 174 U.S. 70 (1899), and the "apportionment" doctrine of state taxation of vehicles moving in interstate commerce developed. This new doctrine was finally made applicable to vessels moving in inland waterways in Ott v. Mississippi Barge Line, 336 U.S. 169 (1949). The Court, however, did "not reach the question of taxability of ocean carriage but confine[d] [its] decision to transportation on inland waterways." Id. at 173-174. Nor has the Court subsequently reached this question, thereby leaving the "home port" doctrine in place with respect to ocean going vessels.

With the advent of commercial aviation, it was reasonable to anticipate that the issue would be raised as to whether aircraft were subject to the "home port" or to the "apportionment" doctrine. Grounded

as it is in the commerce clause interpretation that certain areas of commerce require one, uniform national system of regulation, it is not surprising that the validity of the "home port" doctrine for aircraft engaged in foreign commerce continues to be controlling. The opposite is true with respect to aircraft engaged in interstate commerce, where the "apportionment" doctrine has become firmly established.

In Northwest Airlines v. Minnesota, 322 U.S. 292 (1944), the Court approved the imposition of a full property tax on the corporation's entire fleet, even though the aircraft were engaged in interstate commerce. While it could be argued that this decision affirmed the applicability of the "home port" doctrine, it is more correct to view the decision as endorsing full taxation by the domiciliary state in the absence of any indication by

any other state of claims for apportioned ad valorem taxes.

When the Court next addressed the subject, in Braniff Airways v. Nebraska Board, 347 U.S. 590 (1954), it did endorse the imposition by Nebraska of an apportioned property tax on aircraft flying into the state which were domiciled in another state. Thus, the "apportionment" doctrine announced in Pullman's Palace Car and expanded in Ott was made applicable to aircraft engaged in interstate commerce, although not even by way of dicta did the Court evidence an inclination to impose the "apportionment" doctrine on foreign commerce. The Court is now, however, being asked to do precisely that and to expand this doctrine to embrace foreign-owned instrumentalities of foreign commerce ^{3/} and, thereby, break

^{3/} In Northwest Airlines, Justice Frankfurter stated:

with a long-established doctrine which is validly rooted in the commerce clause and

To what extent it [apportionment] should be carried over to the totally new problems presented by the very different modes of transportation and communication that the airplane and the radio have already introduced, let alone the still more subtle and complicated technological facilities that are on the horizon, raises questions that we ought not to anticipate; certainly we ought not to embarrass the future by judicial answers which at best can deal only in a truncated way with problems sufficiently difficult even for legislative statesmanship. 322 U.S. at 300.

This reminder is particularly relevant when the Court considers the appropriateness of the proposed state tax on cargo containers, a recently developed instrumentality of commerce, as well as the impact of its decision on other instrumentalities, such as aircraft. Each requires individual consideration.

whose underlying genesis dates to Cooley. The air carriers, filing this brief amicus curiae, urge the Court to reject California's ad valorem property tax on the basis of the long and consistently held "home port" doctrine, which, simply put, is a statement of federal exclusivity in the regulation of foreign commerce. Equity underscores this course of action; the commerce clause demands it.

While the Supreme Court has not yet considered the general appropriateness of a state tax on foreign-owned instrumentalities of foreign commerce or the specifics of this issue as they pertain to one such instrumentality, the cargo container, the general issue is not a new one. Nearly twenty years ago, the city and county of Los Angeles assessed apportioned ad valorem taxes on foreign-owned aircraft. The California Supreme Court rejected such taxation

as conflicting with the "home port" doctrine and with international treaties and executive agreements. Scandinavian Airline System v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, cert.denied, 368 U.S. 899 (1961).

In this case, the court undertook a detailed review of the "home port" doctrine and found that, under the doctrine of stare decisis, the "home port" doctrine could lead directly to rejection of the apportioned taxes. However, due to the novelty of this issue, the court decided it should address the issue on principle. Id. at 32, 363 P. 2d. at 40, 14 Cal. Rptr. at 40. The court determined that an instrumentality of commerce can be taxed in its home port. Moreover, if the instrumentality gains taxable situs in another jurisdiction, it is necessary to apportion the taxes in order to avoid the due process constraints on

double taxation. When the instrumentality is engaged in foreign commerce, however, the solution offered by apportionment is an empty one, according to SAS, since there is no worldwide tribunal to meet out a just and reasonable method of assessing taxes.

It is this very fact that compels exclusive federal jurisdiction. Only national governments in their dealings with other national governments can properly and fairly speak to this issue. Permitting state governments within the U.S. to share in this authority is as obviously inequitable in its effects as it is contrary to the commerce clause in its premise. The endorsement of the "home port" doctrine found in SAS, which asserts federal exclusivity under the commerce clause in accord with Cooley, is only a recent reaffirmation of a long-standing principle. To break with this tradition is unsound, not for the simplistic reason that the principle has

been imbued with wisdom due to its longevity, but because it is a fair and correct interpretation of the commerce clause and has long been recognized as such.

This principle of federal exclusivity was also reaffirmed when, in 1974, the California Supreme Court considered the validity of an ad valorem property tax on cargo containers owned by a U.S. company and moving in interstate and foreign commerce. Sea-Land Service v. County of Alameda, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974). While the court upheld the validity of the tax, it was most careful to distinguish its decision from that arrived at in SAS. The issue in the earlier case was whether any state could tax the property of a foreign-owned company engaged exclusively in foreign commerce, whereas the Sea-Land case concerned which state could tax the property of a domestic company engaged in both foreign and

interstate commerce. Id. at 786, 528 P. 2d at 65, 117 Cal. Rptr. at 457. Thus, the Sea-Land decision can in no way be considered an overruling of the SAS decision; rather, it is a reaffirmation of the necessity for a "home port" doctrine standard when the subject matter relates exclusively to foreign commerce, and is analogous to the Supreme Court's 1944 decision in Northwest Airlines v. Minnesota, 322 U.S. 292.

While the California Supreme Court in the Sea-Land case was most careful to recognize the distinction between it and the predecessor SAS case, when the court next considered the general issue, in the case now before this Court, it apparently lost sight completely of this most important distinction. In its consideration of Japan Lines v. County of Los Angeles, 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905, (1977), the court was asked to review the apportioned

tax on cargo shipping containers owned by a foreign company and used exclusively in foreign commerce. While petitioners claimed that the "home port" doctrine was still controlling in the area of foreign commerce, the court concluded that, on the basis of Sea-Land, the doctrine had been rejected. Id. at 185, 571 P.2d at 257, 141 Cal. Rptr. at 908. According to the court, the only difference between the instant case and its 1974 decision was with respect to the ownership of the containers and "Sea-Land is fully dispositive of the commerce clause and federal exclusivity issues raised in the case at bench." Id. at 186, 571 P.2d at 258, 141 Cal. Rptr. at 909.

The amicus parties do not contend that the facts on which the two cases rest are identical but for the question of ownership of the containers. While that distinction is important, it is not the only one. The Japan Line case concerns cargo

containers used exclusively in foreign commerce, and not those used both in foreign and interstate commerce, as is true in Sea-Land. This is a most important distinction. The "home port" doctrine is premised on the principle that the home port has situs jurisdiction over the instrumentality of commerce, which allows for the levying of taxes, and when the instrumentality is involved in foreign commerce, this jurisdiction is exclusive. This is because regulation of an instrumentality of foreign commerce "admit[s] only of one uniform system." Cooley, 53 U.S. (12 How.) at 319.

The lower court's comparison of Sea-Land and Japan Lines completely ignores this critical point and, therefore, fails to heed the distinction, recognized by the California Supreme Court in 1974, between the facts in Sea-Land and those presented earlier in SAS. The Sea-Land court did not reject the directives of SAS; its decision

is a logical outgrowth of it. It recognizes the appropriateness of the apportionment doctrine to the specific facts which were presented to it, facts which were different than those in SAS. It made no attempt to expand its apportionment-based decision to cargo shipping containers moving in foreign commerce and, thereby, preserved the directives of SAS. Those directives are equally applicable to this controversy.

It is urged, therefore, that this Court ratify once again the "home port" doctrine and, thereby, assert the federal exclusivity of taxation on foreign-owned instrumentalities of foreign commerce. The basis of federal exclusivity in the commerce clause of the Constitution, the pronouncement of the Court dating back to Cooley, and general equity principles recommend the correctness of such action.

II. SHOULD THE COURT FIND THE INSTANT AD VALOREM PROPERTY TAX CONSTITUTIONALLY PERMISSIBLE, ITS DECISION SHOULD BE NARROWLY CONFINED TO THE FACTS PRESENTED IN THIS APPEAL

As indicated throughout the prior discussion on federal exclusivity of regulation of foreign commerce, the amici find that the commerce clause to the Constitution and the cited decisions of this Court interpreting it require the rejection of California's property tax on cargo shipping containers. The cargo container is an instrumentality of commerce, albeit a new one when compared to a vessel, and is entitled to the same constitutional considerations provided any other instrumentality of commerce. As the quotation from J. Frankfurter in Northwest Airlines, which appears supra note 3 at 17, makes clear, "more subtle and complicated technological facilities" in transportation can be reasonably anticipated, and each

deserves its own special consideration. The fact that a cargo container may not readily appear comparable to a vessel as an instrumentality of commerce does not deny it that categorization. Rather, current technological advances in transportation must be recognized and reviewed in accordance with the principles established for instrumentalities which preceded them in familiarity of use.

Since the validity of the application of the "home port" doctrine to it depends mightily on the Court's acceptance of the cargo container as an instrumentality of commerce, it is essential that the container be individually scrutinized by the Court. The same particularized attention that is required to be given to the cargo container also necessitates that the decision reached by the Court pertain solely to it. For while the specifics relating

to other instrumentalities are not before this Court, it is clear that blanket endorsement of the state's power to impose property taxes on foreign-owned instrumentalities of commerce will lead directly to a tax assessment on foreign aircraft operating in foreign commerce. This is not mere conjecture; the State Board of Equalization has announced publicly its intention to do so. And, the potential for other states to follow California's lead and, as a consequence, the potential for similar impositions by foreign governments on U.S. air carriers cannot be pushed aside as vague possibilities. They are very real threats. They are also not before this Court, and a decision with respect to them is unnecessary and lacking in factual bases. However, in order that the Court may be persuaded as to the appropriateness of fashioning a narrow decision which relates solely to cargo

containers, should the Court be convinced as to the validity of state taxation of such, the amici believe certain matters should be brought to the Court's attention.

The primary argument advanced in support of the necessity for a narrow decision by the Court is the unique characteristics associated with aircraft engaged in foreign commerce. These aircraft are instruments of commerce traveling international skies. As such, they in many ways resemble the vessels which plied the high seas and formed the basis of the "home port" doctrine. Even when recognizing the emergence of the "apportionment" doctrine, the Court, in Pullman's Palace Car, recognized the aspects of commerce by sea which required it to be given special consideration:

Ships or vessels...are not subject to taxation in another state at whose ports they incidentally and temporarily touch

for the purpose of delivering or receiving passengers or freight. But that is because they are not in any proper sense, abiding within its limits, and have no continuous presence or actual situs within its jurisdiction, 4/ and therefore can be taxed only at their legal situs, their home port and the domicile of their owners.

141 U.S. at 23.

4/ The California Supreme Court's decision in the instant case drew particular attention to the situs issue when it stated that "[i]t is the continuous presence within the jurisdiction drawing upon the services of that jurisdiction to a significant degree which permits reimbursement through non-discriminatory property taxation as opposed to the fleeting presence of imported goods in transit which may possibly be exempted from such taxation by Michelin" [referring to Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976)] Japan Lines, Ltd. v. County of Los Angeles, 20 Cal. 3d at 187, 571 P.2d at 258-259, 141 Cal. Rptr. at 909-910 (1977). By way of analogy, it is asserted that the foreign air carriers serving California

The same reasoning applies to aircraft engaged in foreign commerce. For the aircraft becomes so colored with international hues that allowing individual states to exercise taxing authority over it flaunts the directives of the commerce clause and the due process clause of the fourteenth amendment. The case law in support of both the "home port" and "apportionment" doctrines recognizes this very critical aspect of international transportation which results in particularized treatment. J. Frankfurter, in his dissent in Braniff Airways, eloquently asserted this distinction by stating that "[i]t stands to reason that the drastic differences between slow-moving trains and the bird-like

are akin to the "fleeting... imported goods"; they have no continuous presence within the state and, as described more fully infra, they do not draw on the services of the state.

flight of airplanes would be reflected in the law's response to the claims of the different states and the limitations of the Commerce Clause upon those claims." 347 U.S. at 604.

The amici assert that the particular aspects associated with aircraft in foreign commerce compel, at a minimum, their individual review by this Court. Failure to grant such through a general endorsement of the state's power to tax any and all instrumentalities of commerce would ignore the obvious characteristics of air transportation--characteristics which amici claim to be compelling in requiring exclusive federal regulation--without providing an opportunity to present them fully for review. It is simply an area best left to another day.

Additionally, there ought to be considered the premise on which the state's

power to tax property is frequently conditioned. That is, that the tax be in some way connected to the use of the property within the state or to the benefits provided by the state. While this argument has been criticized, Southern Pacific Co. v. Kentucky, 222 U.S. 63, 73 (1911), it still threads its way through situs/due process arguments involving taxation. Thus, it could be argued that the presence of foreign aircraft in a state, though temporary and non-continuous, resulted in taxable situs since the aircraft were the beneficiaries of the state's police and fire protection.

This argument is inappropriate, however, with respect to foreign air carriers serving the major U.S. airports. These carriers, through the payment of landing fees and charges to local airport proprietors, pay their own proportionate share of the services

provided to them, such as those relating to police and fire protection. For example, at Los Angeles Airport, an aircraft charge of \$.52 per 1,000 pounds of maximum landed weight, the weight being authorized by the certificate of airworthiness, is assessed against each scheduled carrier, including scheduled foreign air carriers. The charge is intended to cover the use of the airport for a complete turnaround including landing, with accompanying use of the runway, taxiway, terminal building, etc., and then, takeoff. It is estimated that a representative charge for a turnaround operation on a B-747 aircraft, which has a maximum landed weight of approximately 564,000 pounds, is \$293.28 (\$.52/1,000 pounds X 564,000 pounds = \$293.28). ^{5/}

^{5/} International Air Transport Association, International User Charges 146 (2d ed. March 1978).

At San Francisco Airport, where a number of foreign air carriers also operate, the aircraft charge is \$.48 per 1,000 pounds of maximum landed weight, with a representative charge for a B-747 approximating \$270.72 for each turnaround operation. ^{6/}

These charges, paid for each and every turnaround operation of the air carriers serving the airport, demonstrate that the carriers pay their own way and, given that the California airports served by scheduled foreign air carriers, Los Angeles and San Francisco Airports, are self-sustaining, it cannot be argued that the carriers are recipients of the largesse of the state. There is, therefore, a due process consideration that would need to be fully explored prior to any assessment of property taxes on the foreign carriers.

^{6/} Id. at 147-148.

A final area that dictates the narrow consideration of this issue before this Court, as urged by the amici, relates again to the federal exclusivity issue. It concerns the prospective imposition of charges, similar in their bases and magnitude to those of California plus those of any other state choosing to follow California's lead, by foreign governments on U.S. air carriers operating in foreign commerce. Since such a development would be of direct economic consequence to the air carriers, filing as amicus curiae, they have a deep and abiding interest in the subject. Their interest is not simply speculative or a modern day example of the little boy crying "Wolf" once too often. It is by now nearly axiomatic that a foreign government will not permit its air carriers, most of which are wholly or partially state-owned, to be at a competitive disadvantage with U.S. air

carriers. 7/ As a result, similar charges, at a minimum, will fall on the U.S. carriers. Moreover, in order not to single out U.S. carriers for discriminatory treatment, 8/ it is possible that similar charges will also fall on the air carriers of all other nations.

7/ Indeed, the U.S. Congress itself enacted legislation specifically designed to assure a fair and equal competitive climate for U.S. carriers operating in international markets in competition with foreign flag carriers. See International Air Transportation Fair Competitive Practices Act of 1974, 49 U.S.C. §1159b (1975).

8/ Such discriminatory treatment would be in violation of the terms of the Convention on International Civil Aviation ("Chicago Convention"), to which some 143 nations--virtually all nations of the world--currently subscribe. See Articles 11 and 15 of the Chicago Convention, open for signature Dec. 7, 1944, 61 Stat. 1180, 1183, 1184-85, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

The ramifications are numerous. There will be a major financial impact on U.S. air carrier operations. Assume that a foreign government, whose air carriers were taxed in, for example, Los Angeles, at a rate of \$13.49 per \$100 of assessed value, were to impose an identical charge on U.S. carriers. The resulting tax liability for one B-747, with a fair market valuation of \$24,000,000, operating into the country once per day and maintaining a turnaround presence of approximately two hours would be \$415.79 per day or \$151,763 per year. 9/ This figure will escalate when

9/ These figures were arrived at by utilizing the applicable California taxation formula. Two underlying assumptions were made in completing the formula, however. First, the "time in state" factor was assumed to be $.0625 \left(\frac{2 \text{ hours in state}}{24 \text{ hours per day}} \right) \times .75 = .0625$. Second, the "arrival/departure"

multiplied by the number of aircraft entering the jurisdiction and the number of countries imposing similar charges.

As dramatic as these figures are, however, it is important to recognize that not only U.S. air carriers may be faced with them. The air carriers of all other nations serving a particular country may receive similar treatment, 10/ which, of course, will lead to parallel action on their nations' behalves, and so on and on in an area where retaliation begets retaliation. The spiralling effect is obvious. So too is its impact on international aviation. The U.S. Government, as a result of the actions of one if not more of its states,

factor was assumed to be .125
$$\frac{(2 \text{ arrivals/departures in state})}{(4 \text{ total arrivals/departures})} \times .25 = .125).$$

10/ See discussion of the Chicago Convention, supra note 8, at 38.

will be characterized as setting off a chain of events having a serious effect on international air rights, in particular, and on international relations, in general. The lack of wisdom in initiating such an inevitable chain reaction calls out for prevention, and the commerce clause of the Constitution provides it. Its specific grant of authority over matters of foreign commerce to the federal government provides not only an answer, but, in fact, requires one.

An area so obviously enmeshed in international affairs as is the foreign commerce of aircraft demands a single, uniform authority. As the Court said in Cooley over 100 years ago,

Conflicts between the laws of neighboring states, and discriminations favorable or adverse to commerce with particular foreign nations, might be

created by state laws..., deeply affecting that equality of commercial rights, and that freedom from state interference, which those who formed the Constitution were so anxious to secure, and which the experience of more than half a century has taught us to value so highly.

53 U.S. (12 How.) at 317. Moreover, the absence of federal taxation in this area is of no weight; failure to exercise specifically granted authority is as much a statement of the U.S. Government's position as a statute which describes it. 11/ The

11/ In fact, by ratification of the "Chicago Convention" on August 6, 1946, and continued faithful adherence to that treaty since that date, the United States has joined with virtually all nations of the world in an undertaking to assure that international civil aviation operates in a climate exemplified by cooperation and free of friction, discrimination and artificial barriers. Among

important point is that this is a particular area of foreign commerce, which is to be regulated by the federal government.

At a minimum, the regulation of foreign aircraft operating in foreign commerce deserves the critical attention of the Court, which can be provided only by a full factual and legal argument. It is, therefore, urged that the Court, being cognizant of the ramifications that will flow from a general assent to California's

the many manifestations of this universal intent in the Chicago Convention, the waiver of customs duties on aircraft, fuel, lubricating oils, spare parts and aircraft stores in Article 24, is a singularly impressive indication of the climate envisioned by all governments, including that of the United States. See Preamble and Article 24 of the Chicago Convention, 61 Stat. 1180, 1186, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

levying of an ad valorem property tax on foreign aircraft, refrain from such and, in determining the validity of the tax in the instant case, confine its decision solely to the specific facts and narrow issue presented by it.

CONCLUSION

The history of the commerce clause of the U.S. Constitution and the Court's interpretations of this clause, dating back to Cooley, in relation to various instrumentalities of commerce support the continued application of the "home port" doctrine to foreign-owned cargo shipping containers moving in foreign commerce. Although the cargo container represents new technology in the commercial area, this should in no way detract from its proper characterization as an instrumentality of commerce. As such, the "home port" doctrine requires that cargo containers be

taxed, if at all, only at their home port, where situs properly lies. Efforts by any other jurisdiction to exercise authority over the instrumentality for taxing purposes must be rejected. In the instant proceeding, this requires the Court to overturn the decision of the California Supreme Court and, thereby, to reject California's ad valorem property tax on the cargo containers of the appellants.

If the Court determines, however, that the Constitutional grant of authority to the federal government to regulate foreign commerce does not prohibit California's taxation of the cargo containers, the air carriers, filing this brief amicus curiae, urge that the Court rule narrowly on this issue. The facts and legal arguments surrounding the imposition by California of an ad valorem tax on foreign-owned aircraft operating in foreign commerce, which is

certain to occur should the Court issue a general pronouncement in this case, are sufficiently different to warrant individual attention. They have not been fully presented to this Court, and are not ripe for review or decision.

SUMMARY OF ARGUMENT

Article 1, section 8, clause 3 of the U.S. Constitution contains a specific grant of power to the federal government to regulate, inter alia, foreign commerce. It does not specifically exclude the states from the exercise of concurrent power. However, the surrendering to the federal government of regulatory authority over foreign commerce, being specific, cannot be rejected lightly, and must be found to be exclusive, according to Cooley, whenever state action conflicts with that of the federal government and whenever the area of regulation "admit[s] of only one uniform system." 53 U.S. (12 How.) at 319.

When the Court was faced with attempts by state governments to regulate, through taxation, vessels docking at their harbors during the course of journeys on the high seas, the Court, in Hays, rejected these efforts and determined that only the "home port" of the vessel could tax it. While this decision concerned interstate as opposed to foreign commerce, it was based, at least in part, on the inability of states to interfere with the free flow of commerce, a decision emanating from the commerce clause.

The "home port" doctrine was modified and narrowed by this Court's decisions over the next one hundred years, but it has been continually sustained as the basis for rejecting taxation of vessels by any state other than that of the home port. State taxation of certain instrumentalities of interstate commerce, including vessels

in inland waterways, railroad rolling stock and aircraft, has been endorsed by this Court under the requirements of the "apportionment" doctrine. But vessels traversing the high seas have never fallen under this taxation doctrine. The reason is simple: the vessel's connection to foreign commerce by virtue of its operation through international waters. Regulation of this instrumentality of commerce is granted to the federal government by the commerce clause, and its regulation by the federal government is exclusive since the area is one which demands but one regulator.

The validity of the "home port" doctrine is equally applicable to other instrumentalities of foreign commerce, such as, in the instant proceeding, foreign-owned cargo shipping containers. The logic associated with its historic application to vessels plying the high seas necessitates

its modern day reaffirmation with respect to this new commercial vehicle. In keeping with the California Supreme Court in the SAS case, this result is not mandated solely on grounds of stare decisis. It is also correct on principle.

If the Court determines that the "home port" doctrine is not controlling, however, and that the decision of the California Supreme Court validating state taxation of foreign-owned cargo containers moving in foreign commerce is correct, the Court's decision should be restricted to the particular commercial instrumentality presented by this appeal. The case law makes clear that different instrumentalities are imbued with special characteristics and, thereby, warrant individual scrutiny. The facts relating to other instrumentalities and, in particular to the airplane, are not before the Court and should not be

reached by this decision. The economic consequences to U.S. and foreign air carriers, and the impact on international air rights and, generally, on international relations compel that these issues be reserved until ripe for decision.

Respectfully submitted,

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